

## 65 - INDEPENDENT AGENCIES - REGULATORY

### 407 - PUBLIC UTILITIES COMMISSION

#### CHAPTER 895 - UNDERGROUND FACILITY DAMAGE PREVENTION REQUIREMENTS

**SUMMARY** – This rule describes the responsibilities of excavators, underground facility operators, the damage prevention system (Dig Safe System, Inc.), and the Public Utilities Commission in implementing Maine’s underground facility damage prevention statute. The rule establishes notification, marking, and reporting procedures, defines violations and penalties, and describes the process by which the Public Utilities Commission will enforce the program and monitor its success.

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## § 1 GENERAL PROVISIONS

A. Purpose and Scope. The purpose of this rule is to implement the provisions of the State's underground facility damage prevention requirements contained in ~~Title 23~~ M.R.S.A. § 3360-A, "Protection of Underground Facilities." The rule establishes the responsibilities of excavators, operators and Dig Safe System, Inc. The rule also establishes the process by which the Public Utilities Commission enforces this program.

B. Applicability. Dig Safe System, Inc. shall be the damage prevention system that operates in Maine. Unless otherwise indicated, the provisions of this rule apply to all operators of underground facilities, excavators, ~~architects and other designers of excavations,~~ and Dig Safe System, Inc.

## § 2 DEFINITIONS

As used in this section, unless the context otherwise indicates, the following terms shall have the following meanings.

A. Business Day. "Business day" means a 24-hour day other than Saturday, Sunday or a legal Maine holiday.

B. Borrow Pit. "Borrow pit" has the same meaning as provided in ~~Title 38~~ M.R.S.A., ~~Section § 482, Subsection (1-A),~~ as it may change from time to time.

C. Commercial Timber Harvesting Activity. "Commercial timber harvesting activity" means the cutting or removal of timber for the primary purpose of selling or processing forest products and includes the attendant operation of mobile or portable chipping mills and of cutting and skidding machinery and the creation, use and maintenance of skid trails, skid roads, winter haul roads and other roads to facilitate timber harvesting.

D. Commission. "Commission" means the Maine Public Utilities Commission.

E. Damage. "Damage" means any impact upon, or removal of support from, an underground facility as a result of excavation or demolition, which according to the operating practices of the operator would necessitate the repair of such facility.

E-1. Damage Prevention Incident. "Damage prevention incident" means an occurrence in which one or more provisions of the Dig Safe law are violated, regardless of whether there is damage to underground facilities.

F. Damage Prevention System or System. "Damage prevention system" or "system" means an organization whose membership is open to all operators of underground facilities located within the State of Maine, which maintains a database, provided by its member operators, that includes the geographic areas in which its member operators desire transmission of notices of proposed excavation and which has the capability to transmit notices of proposed excavation to member operators by teletype, facsimile, computer or telephone.

G. Demolition. "Demolition" means any operation by which a structure or material is wrecked, razed, rendered, moved or removed by means of any tools, equipment or discharge of explosives which could damage underground facilities.

H. Dig Safe System, Inc. or Dig Safe. "Dig Safe System, Inc." or "the Dig Safe System" means the damage prevention system operating in Maine.

I. Emergency. "Emergency" means a sudden or unexpected occurrence involving a clear and imminent danger, demanding ~~immediate~~ action within 12 hours to prevent or mitigate loss of, or damage to, life, health, property or essential public services.

J. Emergency Excavation. "Emergency excavation" means ~~immediate~~ an excavation that is necessary within 12 hours to prevent injury, death or loss of an existing vital service.

K. Excavation. "Excavation" means any operation in which earth, rock or other material below the ground is moved or otherwise displaced, by means of power tools, power equipment or explosives and includes grading, trenching, digging, ditching, drilling, auguring, tunneling, scraping and cable or pipe driving, except tilling of soil and gardening or displacement of earth, rock or other material for agricultural purposes, ~~and except installation and maintenance of signs performed by the Department of Transportation.~~

L. Excavator. "Excavator" means any person proposing to make, making or contracting for an excavation.

M. Mechanical Means of Excavation. "Mechanical means of excavation" means excavation using any device or tool powered by an engine except air vacuum methods of excavation.

N. Member Operator. "Member operator" means an operator that is a member of Dig Safe, Inc.

O. Notify, Notice or Notification. "Notice" or "notification" means the delivery of all required information to the person to be notified and the receipt of it by such person in accordance with this rule. To "notify" means to give notice in accordance with the requirements of this rule.

P. Non-member Operator. "Non-member operator" means an operator that is not a member of Dig Safe, Inc.

Q. Operator. "Operator" means the owner or operator of an underground facility. Within this rule, operators are further categorized as "member operators" and "non-member operators."

R. Person. "Person" means an individual, partnership, municipality, state, county, political subdivision, public utility, joint venture or corporation and includes the employer of an individual.

S. Respondent. "Respondent" means a person alleged to have committed a violation under this rule or 23 M.R.S.A. § 3360-A.

S-1. "Serious damage prevention incident" means a Damage Prevention Incident that results in the loss of human life, personal injury requiring in-patient hospital admission, evacuation, or potential damages exceeding \$10,000, or that has the potential to pose a significant hazard to the health or welfare of the public.

S-2. Shoulder-grading Activity. "Shoulder-grading Activity" means highway maintenance work that involves the use of a motorgrader or other suitable construction equipment with a blade on the shoulder of a road to remove accumulated sand, gravel, sod or other material to establish drainage away from the traveled portion of the highway.

T. Underground Facility or Facility. "Underground facility" or "facility" means any item of personal property buried or placed below ground for use in connection with the storage or conveyance of water, sewage, electronic, telephonic or telegraphic communications, cable television service, electric energy, oil, gas or other substances and including, but not limited to, pipes, sewers, conduits, cables, valves, lines, wires, manholes, attachments, appurtenances thereto and those parts of poles below ground. This definition shall not include highway drainage culverts or underdrains.

U. Underground Facility Operator. "Underground facility operator" -means the owner or operator of any underground facility, other than an underground oil storage facility as defined in ~~Title 38, section M.R.S.A. § 562-A, subsection (21)~~ or an airport aviation fuel hydrant piping system, used in furnishing electric, telephone, telegraph, gas, petroleum transportation or cable television service. "Underground facility operator" does not include a municipality or a public utility with fewer than five full-time employees or fewer than 300 customers or a person that owns underground facilities on its own property for commercial or residential purposes.

V. Violation. "Violation" means any of the actions identified in 23 M.R.S.A. § 3360-A, ~~section (6-C)~~ (the Dig Safe law) as violations subject to the imposition of an administrative penalty and acts of non-compliance with the provisions of this rule.

### **§ 3 ~~REPEALED RESPONSIBILITIES OF THE DESIGNER~~**

~~Architects, engineers, or other persons designing or requiring excavation shall obtain from the operators, recorded information describing the nature and location of all affected underground facilities, and shall make the information a part of the plan by which excavation occurs.~~

### **§ 4 RESPONSIBILITIES OF THE EXCAVATOR**

A. Pre-marking. The excavator shall mark the approximate boundary of a proposed excavation and the excavator's initials in white, or as otherwise established by the Dig Safe System, prior to notifying the Dig Safe System, as required by Section 4(B). If an excavator uses a single stake or other single point indicator as a pre-mark, the excavator must indicate the radius of the proposed excavation area.

## B. Notification

1. Notification to [the Dig Safe System](#)

a. Notice process. Except for emergency notifications and as provided in Subsection 4(B)(1)(a)(i), An excavator shall notify [the Dig Safe System](#) of the location of the intended excavation at least 72 hours, not including Saturdays, Sundays and legal Maine holidays, but not more than 30 calendar days, prior to the commencement of excavation. Notification may be given in writing, by telephone, or by electronic means. Non-emergency notification shall take place between the hours of 7 a.m. and 5 p.m. on normal business days. In the event of an emergency, an excavator shall notify the Dig Safe System and non-member operators as required by Subsection 4(C)(1), and shall indicate that it is an emergency notification.

i. [Proposed location for P.L. 2003, ch. 373 provision waiving 3-day waiting period when no facilities exist within the excavation area. See MPUC Rulemaking Docket No. 2003-671.]

b. Acknowledgement. An excavator shall acquire and record an acknowledgement from [the Dig Safe System](#) for any notice the excavator sends by electronic means.

c. Blasting. If an excavation involves blasting, the excavator shall notify [the Dig Safe System](#) in writing of the date and location of the blasting. This written notice must be given and received at least 24 hours in advance of the blasting, except that, in the case of an unanticipated obstruction requiring blasting, the excavator shall provide written notice not less than four hours in advance of that blasting.

d. Renotification. If the proposed excavation or blasting does not commence within 30 calendar days of notification or the excavation or blasting will be expanded outside the location originally specified in the notification, the excavator shall renotify [the Dig Safe System](#) as specified in this section.

e. Contents of notice. Notification to [the Dig Safe System](#) shall contain the following information:

- 1) the name of the individual serving such notice;
- 2) the location of the proposed excavation;
- 3) the name, address, telephone number and the telefacsimile (fax) number, if available, of the excavator;
- 4) the excavator's field telephone number, if available; and
- 5) the type and extent of the proposed excavation.



2. Additional notifications. In addition to notifying the Dig Safe System as required in Subsection 4(B)(1), an excavator shall notify any non-member operator in the area of the proposed excavation. This notice must be in accordance with ~~s~~Subsection 4(B)(1) except that it will be provided directly to the non-member operator and not to the Dig Safe System.

3. Subcontractors and multiple excavators. In the case of an excavation involving subcontractors or other arrangements in which more than one entity qualifies as the excavator under this rule, the excavator directly responsible for performing the excavation shall ascertain that all notifications required by this rule are performed.

#### C. Excavation

1. Emergency excavations. In an emergency, an excavator may commence an excavation after taking all reasonable steps, consistent with the emergency, to pre-mark the excavation site and notify the Dig Safe System and non-member operators pursuant to ~~subs~~Section 4(B).

2. Safety zone. An excavator may not use mechanical means of excavation when excavating within 18 inches in any direction of any marked underground facilities until the underground facilities have been exposed, except that mechanical means may be used, as necessary, for initial penetration and removal of pavement, rock or other materials requiring use of mechanical means of excavation. Once ~~the~~ underground facilities have been exposed, further excavation must be performed employing reasonable precautions to avoid damage to the underground facilities (unless the operator of the underground facilities has positively identified the facilities as inactive or abandoned, pursuant to Subsection 6(F)(3), and has indicated that there is no need to protect them from damage), including, but not limited to, any substantial weakening of structural or lateral support of the facilities or penetration or destruction of the facilities or their protective coatings. The lateral boundaries of the safety zone shall be the operator's tolerance zone markings as directed in ~~s~~Subsection 6(B)(4)(b).

3. Maintenance of markings. An excavator shall maintain markings made by an operator pursuant to Section 6(B). If an excavator cannot maintain the markings, the excavator shall request that the operator reapply the markings.

4. Unmarked underground facilities. Any unmarked, underground facility discovered during an excavation must be treated as an active facility until the facility operator has been notified by the excavator (pursuant to Subsection 4(D)(1)) and has visited the site and positively identified the facility as inactive or abandoned.

#### D. Reporting

1. Notice of damage to operator. An excavator who damages an underground facility or discovers an unmarked underground facility shall immediately notify the affected operator. The excavator shall not backfill an excavation where damage has occurred or where an unmarked facility has been discovered without first receiving permission from the affected operator.

2. Report to Commission. An excavator involved in an excavation shall report to the Commission any suspected Damage Prevention incidents as defined in Section 2(E-1) ~~violations of this rule that the excavator observes during an~~ associated with that excavation, and that:

~~\_\_\_\_\_ a. \_\_\_\_\_ pose a clear threat to an underground facility; or~~

~~\_\_\_\_\_ b. \_\_\_\_\_ result in damage to an underground facility.~~

The suspected Damage Prevention incident ~~violation~~ shall be reported on the Underground Facility Damage Prevention Incident Report form available from the Commission (207) 287-3831 or <http://www.state.me.us/maine.gov/mpuc>). The excavator shall submit this report within 10 days of discovering a suspected ~~violation~~ Damage Prevention incident.

\_\_\_\_\_ Any person may report to the Commission any other failure to comply with this rule or other concerns regarding underground facilities damage prevention, using the Underground Facility Damage Prevention Incident Report form.

#### E. Legal Effect of Non-compliance.

1. Excavator. The failure of an excavator to provide any or all notices required by Subsections 4(B)(1) and 4(B)(2) for an excavation that results in damage to an underground facility or facilities shall be prima facie evidence in any civil or administrative proceeding that the damage was caused by the negligence of the excavator.

2. Member Operator. If an excavator complies with all excavator responsibilities described in Sections 4(A) and Subsection 4(B)(1), and if the Dig Safe System does not provide all information pursuant to Section 5(A) or an operator does not provide all information pursuant to Section 6(B) or the information provided fails to identify the location of the underground facilities in accordance with Section 6(B), then an excavator is not liable for any damage or injury caused by the excavation, except on proof of negligence.

3. Non-member Operator. If an excavator provides notice to non-member operators pursuant to Subsection 4(B)(2), and if a non-member operator fails to mark the location of its facilities pursuant to Section 6(B), then an excavator is not liable for any damage or injury caused by the excavation, except on proof of negligence.

#### F. Exemptions

1. \_\_\_\_\_ Commercial Forestry and Borrow Pit Operations

\_\_\_\_\_ 4a. Activity requiring no written agreement. An excavator is exempt from the notice requirements of Sections 4(A) and 4(B) for any excavation undertaken in conjunction with a commercial timber harvesting activity or borrow pit operation provided the excavation:

a-1) is not conducted in a public place, on public land or within a public easement, including, but not limited to, a public way;

      b-2) is not conducted within 100 feet of an easement or land owned by an underground facility operator;

      c-3) is not conducted within 100 feet of an underground facility; and

      d-4) does not involve the use of explosives.

      2b. Activity requiring written agreement. An excavator is exempt from the requirements of Sections 4(A), 4(B) and 4(C) for any excavation undertaken in conjunction with a commercial timber harvesting activity, when that excavation is within 100 feet of an underground facility or on an easement or land owned by an operator or within 100 feet of an easement or land owned by an operator if the excavator:

      a-1) contacts the Dig Safe System to identify all member operators within the area of the excavation;

      b-2) enters into written agreements with all operators within the area of the excavation and with all persons owning the land on which the excavation occurs; and

      c-3) undertakes the excavation in accordance with the terms of the written agreements.

2. Cemeteries. An excavator is exempt from the notice requirements of Section 4(B) for any excavation undertaken within the boundaries of a cemetery if the following procedures are followed.

a. The person responsible for operating the cemetery shall provide notice pursuant to Section 4(B) identifying the entire cemetery as a potential excavation site. Owners and operators of underground facilities within the cemetery shall mark those facilities in accordance with Section 6(B) as applicable. Thereafter, the person responsible for operating the cemetery shall maintain sufficient records or markings to identify the location of underground facilities within the cemetery.

b. The person responsible for operating the cemetery shall identify the location of any underground facilities within the excavation area and take appropriate action to avoid damage to the facilities.

3. Shoulder-grading Activity. An excavator that is a licensing authority as defined by 35-A M.R.S.A. § 2502(1) or its designee is exempt from Subsection 4(C)(2) for any excavation that is shoulder-grading activity if the excavator complies with this subsection. If an excavator chooses to excavate under this subsection, all owners of underground facilities within the area of excavation must comply with this subsection.

a. The excavator shall provide notice as required by Section 4(B) and the owner or operator of underground facilities shall respond as required by Section 6(B).

b. The excavator shall contact each owner or operator of underground facilities within the area of proposed shoulder-grading activity and describe the scope of its proposed shoulder-grading activity, including the anticipated depth of grading.

c. The owner or operator of each underground facility shall within 3 business days determine and notify the excavator whether the depth of its facility is sufficient to avoid damage.

d. After receipt of notice pursuant to Subsection 4(F)(3)(c), the excavator may commence its shoulder-grading activity in a manner that does not disturb the facilities indicated by the owners or operators of the underground facilities or, if a facility is located at an insufficient depth to allow the proposed shoulder-grading activity, prior to the shoulder-grading activity the licensing authority may require the owner or operator of the underground facility to lower or otherwise move its facility in accordance with applicable law and the terms of its license.

## § 5 RESPONSIBILITIES OF THE DIG SAFE SYSTEM

A. Notification. Upon receiving notice of excavation as required by Section 4(B), the Dig Safe System shall immediately notify all member operators whose underground facilities may be affected by the notice.

### B. System Requirements

1. The Dig Safe System shall provide a single, statewide, toll-free telephone number. All telephone directories shall prominently display the toll-free number: 1-(888)-DIGSAFE (1-(888)-344-7233) or such other number that may be established.

2. At a minimum, the Dig Safe System shall staff its operation from 7 a.m. to 5 p.m. each day excluding Saturdays, Sundays and legal Maine holidays. The Dig Safe System shall provide emergency notification 24 hours per day, 7 days per week.

3. The Dig Safe System shall provide adequate communication equipment and personnel sufficient to answer calls within 20 seconds under normal operating conditions or otherwise as soon as practicable.

4. The Dig Safe System shall transmit non-emergency messages to member operators by 6:00 p.m. on the date of receipt. The Dig Safe System shall transmit emergency messages to member operators within 10 minutes of receipt under normal operating conditions or otherwise as soon as practicable.

5. [The](#) Dig Safe [System](#) may adopt rules requiring face-to-face meetings between excavators and member operators.
6. The cost of operating [the](#) Dig Safe [System](#) shall be apportioned equitably among its member operators.
7. [The](#) Dig Safe [System](#) shall maintain adequate records to document compliance with the requirements of this rule. [The](#) Dig Safe [System](#) shall annually report to the Commission information adequate to demonstrate the extent to which it answers calls and transmits messages within the time frames required by this rule.

C. Public Awareness Programs

1. [The](#) Dig Safe [System](#) shall provide all member operators with a brochure explaining Dig Safe's objectives, procedural guidelines and opportunities for member participation.
2. Upon request, [the](#) Dig Safe [System](#) shall provide training to operators and excavators regarding its operations.
3. [The](#) Dig Safe [System](#) shall conduct a public awareness program, including but not limited to making literature available describing [the](#) Dig Safe [System](#), distributing such literature to the public, and making such literature available for purchase and distribution to requesting parties.

## § 6 RESPONSIBILITIES OF THE OPERATOR

A. Dig Safe [System](#) Membership

1. Members
  - a. An underground facility operator, as defined in Section 2(U), must join [the](#) Dig Safe [System](#). Any other operator may voluntarily join [the](#) Dig Safe [System](#).
  - b. All members of [the](#) Dig Safe [System](#) shall pay to [the](#) Dig Safe [System](#) the cost of operation apportioned to the members pursuant to ~~s~~[S](#)ubsection 5(B)(6).
  - c. All members of [the](#) Dig Safe [System](#) shall maintain communications equipment that is compatible with [the](#) Dig Safe [System](#)'s communication equipment maintained pursuant to ~~s~~[S](#)ubsection 5(B)(3).
  - d. [Location of provision establishing means by which each member shall identify and report to the Dig Safe System its underground facilities locations. See MPUC Rulemaking Docket No. 2003-671.]
2. Non-members. An operator that is not a member of [the](#) Dig Safe [System](#) pursuant to ~~s~~[S](#)ubsection 6(A)(1) shall, upon receipt of the notice provided for in ~~s~~[S](#)ubsection 4(B)(2), mark the location of its underground facilities in accordance with ~~subs~~[S](#)ection 6(B).

## B. Marking

1. Purpose. An operator shall, upon receipt of the notice provided in Subsection 4(B)(2) or Section 5, advise the excavator of the location and size of the operator's underground facilities ~~(including any abandoned or inactive facilities the operator is required to mark in accordance with Section 6(F))~~ and all underground facilities used in furnishing electric or gas service that are connected to the operator's facilities, located in the public way and known to the operator within the area of the proposed excavation by marking the location of the facilities in accordance with this subsection. If the operator determines that there are no facilities in the proposed excavation area that it is obligated to mark, it shall inform the excavator in writing, prior to the expiration of the excavator's waiting period, either by electronic facsimile or e-mail or by placing marks at the excavation site that so indicate.

### 2. Time requirements

a. Initial marking. The operator shall complete marking no later than two business days after receipt of the notice provided for in Section 5 or Subsection 4(B)(2), unless the proposed excavation is of such length or size that the operator cannot reasonably mark all its underground facilities within two business days. In such an instance, the operator shall inform the excavator, and the excavator shall notify the operator of the location in which excavation will first be made. The operator shall mark the underground facilities in that location within two business days and will mark the remaining facilities as soon as practicable.

b. Re-marking. Following an excavator's request to re-mark an excavation area pursuant to ~~s~~Subsection 4(C)(3), an operator shall again mark this location within one business day.

c. Emergencies. An operator shall mark its underground facilities as soon as practicable after receiving notification of an emergency excavation pursuant to Subsection 4(C)(1).

d. Test holes. After receiving notification pursuant to Section 5 or Subsection 4(B)(2), if an operator must dig test holes in order to locate its underground facilities, other operators within the premarked area shall mark their facilities within one business day of notification from the excavating operator or within a time frame agreed upon by the excavator.

3. Markers. The operator shall use paint, stakes, flags or other appropriate means to mark its underground facilities. The physical characteristics in the area of the proposed excavation shall be considered when determining the type of marker to be utilized. Markers shall conform to the color code established by the Dig Safe System, as follows:

- a. Red: electric power lines, cables, conduit, or lighting cables;
- b. Yellow: gas, oil, steam, petroleum, or gaseous materials;



conduits;

c. Orange: communication, alarm, or signal lines, cables, or

d. Blue: water, irrigation, or slurry lines;

e. Green: sewers or drain lines; and

f. Purple: reclaimed water, irrigation, and slurry lines.

4. Marking procedures

a. Identification. Marking shall identify changes in direction or terminations occurring within, and at least 10 feet beyond, the immediate area of the proposed excavation. Where practical, all marking methods shall indicate the width of the underground facility. Markings shall be made at intervals of no more than 25 feet.

b. Tolerance zone. Except if using the centerline marking method described in Subsection 6(B)(4)(c)(2), the operator shall mark a finite area, designated the "tolerance zone," on each side of the underground facility. The operator shall also indicate the depth of the facility, if known. In all circumstances, the tolerance zone for each facility will be an area 18 inches for member operators and 36 inches for non-member operators on each side of the facility for the length of the facility.

c. Marking methods. The operator shall use one of the following marking methods to establish the tolerance zone of an underground facility:

1) The corridor marking method. This method involves placing markers at either boundary of the tolerance zone, such that the markers will be placed away from the facility centerline 18 inches plus one-half the width of the facility. If an operator maintains two or more facilities in close proximity to each other within the excavation area, one tolerance zone may include both facilities. In this instance, the boundaries of the zone shall be established by locating the boundaries of each separate facility and placing markers 18 inches from the outer boundaries of the multiple facilities. In this circumstance, the operator shall mark the centerline of each facility within the marked boundaries.

2) The centerline marking method. This method involves placing markers directly over the centerline of the facility, permitting the excavator to establish boundaries of the tolerance zone at points located 18 inches plus half the width of the facility from the markers. The width of the facility shall be indicated upon the markers. If an operator maintains two or more facilities in close proximity to each other within the excavation area, the operator shall place markers over the centerline of each facility.

3) The offset marking method. This method involves locating the centerline of the facility by placing markers at locations that parallel the facility. The offset marking methods shall be used only when it is impractical to use either the

corridor or centerline methods. The markers used for the offset marking methods shall indicate the distance and direction to the centerline of the facility and its width.

C. Reporting

1. Report to Commission. An operator shall report to the Commission any suspected Damage Prevention Incidents as defined in Section 2(E-1) regardless of whether damage to underground facilities occurs. ~~violations of this rule that an operator observes and that:~~

~~a. pose a clear threat to an underground facility; or~~

~~b. result in damage to an underground facility.~~

The suspected Damage Prevention incident ~~violation~~ shall be reported on the Underground Facilities Damage Prevention Incident Report form available from the Commission (207-287-3831 or <http://www.state.me.us/maine.gov/mpuc>). The operator shall submit this report within 10 days of discovering a suspected violation. In the event of a serious Damage Prevention Incident, the operator shall also provide immediate notice to the Commission in a manner consistent with the most recent notification procedures provided by the Commission. ~~by contacting Gary Farmer (207-287-1385) or Joseph Sukaskas (207-287-1375).~~

Any person may report to the Commission any other failure to comply with this rule or other concerns regarding underground facilities damage prevention, using the Underground Facility Damage Prevention Incident Report form.

2. Annual activity report. An operator with more than 25 miles of underground facilities shall submit a report to the Commission within 75 days after the end of each calendar year that states the total number of excavation notifications received by the operator during the previous year and the total miles of underground facilities it operates.

D. Natural Gas Operators

1. Applicability. The provisions of this subsection are applicable to gas operators. For the purposes of this subsection, a gas operator is a natural gas pipeline utility or a gas utility other than a gas utility over which the Commission has limited safety jurisdiction pursuant to 35-A M.R.S.A. § 4702.

2. Excavation notice to fire departments. In addition to providing other notices required under this rule, before commencing any excavation for the purpose of working on an underground transmission line, a gas operator shall provide notice of any excavation to the Fire Department within whose service area the excavation will occur. This notice must be in writing or by telephone and must be given at least three business days prior to excavation. Work may not commence until the operator has received from the Fire Department an acknowledgement of the notice either by telephone or in writing.



3. Emergency management information. Each gas operator shall provide maps that clearly indicate the location and depth of all main supply underground gas facilities to the following jurisdictions:

- a. each municipality within which it operates;
- b. each fire department within whose service territory it operates;
- c. the county emergency management agency for each county within which it operates; and
- d. the Maine Emergency Management Agency.

The gas operator must provide updated maps to the appropriate entities whenever changes occur to the configuration of the operator's main supply underground gas facilities.

E. Legal Effect of Non-compliance

1. Members. If an operator does not provide all information pursuant to Section 6(B) or the information provided fails to identify the location of the underground facilities in accordance with Section 6(B) or if the Dig Safe System does not provide all information pursuant to Section 5(A), and an excavator complies with all excavator responsibilities described in Sections 4(A) and Subsection 4(B)(1), then an excavator is not liable for any damage or injury caused by the excavation, except on proof of negligence.

2. Non-members. If an excavator provides notice to non-member operators pursuant to Subsection 4(B)(2), and if a non-member operator fails to mark the location of its facilities pursuant to Section 6(B), then an excavator is not liable for any damage or injury caused by the excavation, except on proof of negligence.

F. Abandoned or Inactive Facilities.

1. Operators with an electronic mapping system. Beginning on the date an owner or operator of underground facilities is required by the Public Utilities Commission to implement electronic mapping, the owner or operator shall indicate the existence of facilities abandoned or inactive after that date in its electronic mapping system and shall notify an excavator when mark its abandoned or inactive underground facilities that exist in the area of a proposed excavation.

2. Operators without an electronic mapping system. If an owner or operator of an underground facility does not maintain an electronic mapping system as required by Chapter 140 of the Commission's rules, the owner or operator shall notify an excavator of any mark in the area of a proposed excavation all its abandoned or inactive facilities in the area of a proposed excavation of which it is aware. An operator shall be conclusively presumed to be aware of any facilities abandoned after March 28, 2002.

3. When notifying an excavator that abandoned or inactive underground facilities exist in the area of the proposed excavation, the operator must also inform the excavator that:

- a) In addition to the abandoned or inactive facilities, there may also be unmarked, active facilities within the excavation area; and
- b) Anytime an unmarked underground facility is discovered during excavation, the excavator must treat the line as active and notify the operator of the facility, as soon as possible.

Upon receiving notification from the excavator that an unmarked facility has been discovered, the operator must visit the site and positively identify whether the facility is active or inactive.

## § 7 COMMISSION ACTIVITIES

A. Monitoring. The Commission may require operators, excavators, or the Dig Safe System to report information that the Commission determines is needed to monitor the operation of the underground facilities damage program, or to hear and resolve complaints concerning failure to comply with the provisions of 23 M.R.S.A. § 3360-A (the Dig Safe Law) or this rule.

B. Enforcement Action Procedure. The Commission shall use the following process when it initiates an enforcement action:

1. Notice of probable violation

a. Probable violation. If the Commission finds evidence of a probable violation of the Dig Safe Law (23 M.R.S.A. §3360-A) or this rule, it shall issue a notice of probable violation (NOPV) to the respondent. The Commission may delegate the decision concerning the issuance of a NOPV to its staff.

b. Content of notice. The NOPV shall state the name of the respondent, the factual basis for the alleged violation, and the amount of the administrative penalty recommended to resolve the matter.

c. Right to contest. The NOPV shall state that the respondent has a right to contest the allegation of probable violation by requesting, in writing within 30 days, an informal review.

d. Default. If the respondent fails to request an informal review of the NOPV within 30 days of its receipt, the respondent shall be deemed, upon issuance of an appropriate Commission order, to have defaulted and to have committed the violations alleged. A Commission order on default shall be treated as a finding of a violation for purposes of future applications of this rule.

e. Penalty. If the respondent is declared to have defaulted by a Commission order, the respondent shall, upon issuance of the Commission order be liable

to pay the administrative penalty or take the action designated in the NOPV unless the Commission orders otherwise. The Commission may not impose a greater administrative penalty than contained in the NOPV without holding an adjudicatory hearing or obtaining the consent of the respondent. The Commission may reduce the penalty or modify any required remedial action as it determines is warranted.

## 2. Informal review

a. Staff review. If a respondent contests a NOPV, a staff member designated by the Commission shall conduct an informal review. The review shall consist of an informal conference, ~~and~~ an analysis of the respondent's written reply, if any, ~~or both.~~ At the request of the respondent, the staff member designated by the Commission may elect to waive the informal conference.

b. Date for informal conference. The informal conference, ~~if not waived,~~ shall be scheduled no less than 21 days, and no more than 60 days, from the issue date of the NOPV.

c. Written reply. The respondent may file a written reply with the Commission on or before the day scheduled for the informal conference. The respondent or the respondent's designee must sign the written reply and shall include a statement of all relevant facts and authority and the basis for respondent's dispute of the alleged violation.

### d. Informal conference

1) At the informal conference, the respondent shall have the right to be represented by an attorney or other person, to present evidence and make arguments in support of respondent's position.

2) The Commission shall make available to the respondent any evidence that indicates that the respondent may have violated these rules or 23 M.R.S.A. § 3360-A.

3) The Commission may require any person that may have information relevant to determining responsibility for a damage prevention incident to attend the informal conference, and/or to provide documentation or other evidence.

## 3. Recommended decision

a. Following the informal conference, the Commission staff member shall issue in writing, a recommended decision indicating whether or not the respondent has violated the Dig Safe Law or these rules and the basis for that conclusion, and the recommended disposition.

b. The recommended decision will be sent to the respondent by mail, return receipt requested and forwarded to the Commission.

c. If the recommended decision is adverse to the respondent, the

respondent may request an adjudicatory hearing.

4. Adjudicatory hearing

a. Election. A respondent may request an adjudicatory hearing only after informal review. Such request must be made in writing within 30 days of the date of receipt of the staff's recommended decision and shall identify the findings or conclusions in the recommended decision with which the respondent disagrees and indicate the respondent's position on these matters.

b. Failure to request hearing. A respondent that fails to make a timely request for an adjudicatory hearing shall be liable to pay the administrative penalty or take the remedial action designated in the staff's recommended decision upon issuance of a Commission order. Unless otherwise ordered, the Commission will consider this order as a finding of a violation for purposes of future applications of this rule. The Commission may not impose a greater administrative penalty than contained in the NOPV without holding an adjudicatory hearing or obtaining the consent of the respondent. The Commission may reduce the penalty or modify any required remedial action as it determines is warranted.

c. Hearing. The adjudicatory hearing shall be a de novo hearing and shall be conducted in accordance with 5 M.R.S.A. §§ 9051-9064.

5. Remedial orders. After considering all of the evidence, if the Commission finds that a violation has occurred, it may issue a remedial order.

a. Content. The remedial order shall set forth the factual and legal basis of the Commission's findings and may direct the respondent to take any action, including the payment of an administrative penalty, as authorized by this rule.

b. Effect. A remedial order issued by the Commission shall have the same effect as any order issued by the Commission.

6. Consent agreements. Notwithstanding any other provision of this rule, the Commission may at any time resolve an alleged violation with a consent agreement.

a. Content. A consent agreement must be signed by the respondent, or a duly authorized representative, and must indicate agreement with the terms therein.

b. Order. A consent agreement is effective only if approved by the Commission through the issuance of an order.

C. Commission Action.

1. In all cases in which respondent has not requested an adjudicatory hearing, the Commission will consider the evidence along with the proposed disposition (uncontested NOPV or staff's recommended decision, or consent agreement), in deliberative session, and take one of the following actions:

a. If the proposed disposition finds that respondent did not commit a violation, the Commission may, by order,

i. accept that finding and take no further action, or

ii. reject that finding and notify the respondent that the matter will be scheduled for an adjudicatory hearing and decision.

b. If the proposed disposition finds that respondent did commit a violation and the respondent agrees to the proposed disposition, the Commission may, by order,

i. Accept the finding and order an equal or lesser penalty or disposition without giving respondent further notice,

ii. Accept the finding but not the disposition and notify the respondent that it has set the matter for adjudicatory hearing to consider a higher penalty or more burdensome disposition, or

iii. Reject the finding and proposed disposition and dismiss the NOPV or notify the respondent that it has set the matter for adjudicatory hearing.

2. In cases in which the Commission has held an adjudicatory hearing, the Commission will consider the evidence in deliberative session and determine whether respondent has violated the Dig Safe Law or this rule.

a. If the Commission finds no violation, it will dismiss the NOPV and take no further action.

b. If the Commission finds that respondent has committed a violation, it may impose any penalty authorized by law.

## **§ 8 ADMINISTRATIVE PENALTIES**

### **A. Approval Required**

1. The Commission must approve in a deliberative session the disposition of every alleged violation that requires payment of an administrative penalty or other remedial action.

2. The Commission's deliberation and approval by order of the imposition of an administrative penalty or other remedial action satisfies the statutory requirement for an adjudicatory proceeding in 23 M.R.S.A. § 3360-A(6-C).

B. Penalty Assessment. The Commission may impose an administrative penalty on an excavator or member operator that is found by the Commission in a proceeding under ~~s~~Section 7 to have committed a violation included in Section 8(C) below. |

C. Violations. The Commission may impose an administrative penalty for any of the following violations:

1. Excavation that does not comply with the requirements of Section 4(A), S ubsection 4(B)(1)(a) through 4(B)(1)(d), or S ubsection 4(C)(2), except to the extent the excavator is exempt from the provisions of these subsections;
2. Excavation done in a reckless or negligent manner that poses a threat to an underground facility;
3. Failure of a member operator to comply with the requirements of S ubsection 6(B)(1), 6(B)(2)(a), 6(B)(2)(b) or 6(B)(4)(b), except to the extent the member operator is exempt from the provisions of the subsection; and
4. Marking by a member operator of the location of an underground facility in a reckless or negligent manner.

D. Violation Conditions. Before imposing a penalty, the Commission shall consider evidence of the record of the violator, including, to the extent applicable, the number of successful excavations undertaken by the violator or the number of locations successfully marked by the violator during the prior 12 months. Administrative penalties imposed pursuant to these rules are in addition to any other remedies or forfeitures provided by law and any liability that may result from the act or omission constituting the violation.

E. Penalty Level

1. ~~Single violation~~First incident. The administrative penalty shall not exceed \$500 per violation if during the 12 months preceeding the date of the violation the excavator or member operator has not been found to have committed a violation pursuant to Section 8 ~~within the 12 months prior to committing the violation that results in the penalty~~.
2. ~~Multiple violations~~Subsequent incidents. The administrative penalty shall not exceed \$5000 per violation if during the 12 months preceeding the date of the violation the excavator or member operator has been found to have committed a violation pursuant to Section 8 ~~within the 12 months prior to committing the violation that results in the penalty~~.

F. Training Requirements. In addition to other actions taken by the Commission, the Commission may require an excavator or member operator who is found pursuant to Section 7 to have violated this rule or 23 M.R.S.A. § 3360-A to participate, at the expense of the violator, in an educational program developed and conducted by the Dig Safe System.

## § 9 CONTEMPT

Failure to comply with any order, decision, rule, or requirement of the Commission may be punished using its contempt authority in 35-A M.R.S.A. §1502.

## **§ 10 IMPRUDENT ACTION**

Compliance with this rule does not excuse a person from acting in a careful and prudent manner nor does compliance with this rule excuse a person from liability for damage or injury for failure to so act.

## **§11 INJUNCTIONS**

Under appropriate conditions, the Commission or an operator may act under the authority of 23 M.R.S.A. § 3360-A-(12) and seek a temporary restraining order or injunction to prevent a person from undertaking an excavation that may result in damage to an underground facility.

## **§12 WAIVER OR EXEMPTION**

Upon the request of any person subject to the provisions of this Chapter or upon its own motion, the Commission may waive any of the requirements of this Chapter that are not required by the statute. Where good cause exists, the Commission, the Director of Technical Analysis, or Presiding Officer in a proceeding related to this Chapter may grant the requested waiver, provided that the granting of the waiver would not be inconsistent with the purposes of this Chapter or Title 35-A.

**BASIS STATEMENT:** The factual and policy basis for this Chapter is set forth in the Commission's Order Adopting Rule and Statement of Policy Basis, Docket No. 2000-419, issued on October 31, 2000 and its Order Amending Rule, Docket No. 2003-672 issued on January , 2004. Copies of ~~this~~these Statements and Orders have been filed with this Chapter at the Office of the Secretary of State. Copies may also be obtained from the Administrative Director, Public Utilities Commission, 242 State Street, 18 State House Station, Augusta, Maine 04333-0018.

**AUTHORITY:** 5 M.R.S.A. § 8001 et seq., 23 M.R.S.A. § 3360-A, 35-A M.R.S.A. §~~§~~ 104, 111, and 1502.

**EFFECTIVE DATE:** This Chapter was initially approved as to form and legality by the Attorney General on 11/01/00 and was effective on 11/12/00. Its amendments were filed with the Secretary of State on 1/ /04 and will be effective on       .